BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning Broadband	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	
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	)	
	)	
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REPLY COMMENTS

OPENNET COALITION

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SUMMARY OF REPLY COMMENTS SUBMITTED BY THE THE OPENNET COALITION

As stated in OpenNet's original comments, we urge the Federal Communications Commission ("FCC") to use this Notice of Inquiry proceeding to recognize, in accordance with the Ninth Circuit's *Portland* decision, that cable modem services are telecommunications services subject to the nondiscriminatory provisions of the Communications Act of 1934, as amended. The Commission's "hands off" policy toward cable open access has allowed cable operators to provide a telecommunications service through cable modem without being subject to the laws, regulations and principles governing telecommunications service. As a result, the FCC has inadvertently permitted cable operators to avoid regulation while capturing a disproportionate share of the broadband Internet market by engaging in the type of discriminatory behavior that is antithetical to the principles of the Communications Act.

The comments submitted by cable operators and their supporters do not provide a rational basis for the Commission not to classify the transport component of cable modem service as a telecommunications service. The comments submitted by the cable operators misconstrue the proper classification of cable modem service by arguing that this telecommunications service is actually a cable service, an information service, or both.

Despite the assurances made by cable operators to the contrary, the marketplace is not providing true competition in the broadband Internet market. Despite the clear need for and consumer benefits associated with mandated open access to cable broadband platforms, very few open access agreements have been negotiated between cable companies and non-affiliated ISPs. The lack of such agreements, in the face of cable dominance in the broadband Internet market, makes clear that the marketplace is failing to produce open access.

In order to ensure that broadband access to the Internet continues to grow and supports the same degree of choice amongst ISPs that currently exists on the dial-up side, the OpenNet Coalition respectfully submits that the Commission should recognize that the transmission component of cable broadband Internet access service is a telecommunications service subject to common carrier regulation under Title II. Absent Commission action, cable operators will be able to maintain their dominant market share over the broadband Internet marketplace by exercising monopolistic control over broadband bottleneck facilities.

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REPLY COMMENTS OF THE OPENNET COALITION

The OpenNet Coalition, the nation's largest Internet Service Provider ("ISP") coalition representing nearly 1,000 ISPs and Internet-related companies,[1] by its counsel, submits these reply comments as requested in the Federal Communications Commission's (Commission) Notice of Inquiry ("NOI") issued on September 28, 2000.[2] These reply comments largely respond to representations and arguments made by cable industry participants submitting comments in this inquiry.[3]

I. INTRODUCTION

There is no question that the openness and accessibility of the public switched telephone network (PSTN) has resulted in the extraordinary growth of the Internet and the emergence of

[1] For a list of OpenNet members as well as information about the coalition, see the web site at www.opennetcoalition.org.

[2] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, (September 28, 2000) (hereinafter "NOI"). The NOI requests reply comments to be submitted 75 days after publication in the Federal Registrar. NOI at 1.

approximately 7,000 ISPs providing dial-up Internet access services.[4] Because Title II of the Communications Act of 1934, as amended, (the "Act") legally obligates telephone companies to carry all traffic on a nondiscriminatory basis, American consumers have the choice of numerous ISPs providing dial-up narrowband Internet access services who compete on the basis of price, quality of service, and content offerings.

Consumers and businesses today, however, are demanding high-speed broadband delivery of packaged voice, data, video, and other on-line services over the Internet that narrowband Internet access services cannot technically accommodate. In response, facilities-based providers, including cable operators and telephone companies, have transformed their networks into broadband communications infrastructures capable of delivering a broad array of high-speed services directly to American homes and offices. Despite the cable industry's misleading contentions about the competitiveness of the high-speed Internet access market, cable operators have utilized their newly renovated cable systems to gain a dominant share of this market in relation to their primary broadband competitors: incumbent and competitive local exchange carriers offering Digital Subscriber Line ("DSL") service. Consequently, the renovated cable systems across the country provide the dominant and essential last-mile transport facilities for broadband Internet services.

In order to ensure that the Internet continues to grow and support the same degree of choice among ISPs that currently exists, OpenNet respectfully submits that the Commission must

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[3] These include AT&T Corporation, Comcast Corporation, Cox Communications, Inc., Charter Communications, Inc., Cablevision Systems Corporation, and the National Cable Television Association (NCTA).

[4] United States General Accounting Office (GAO) Report to the Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary, US Senate, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, (October 2000), at 29 (hereinafter "GAO Report").

recognize that the transmission component of cable broadband Internet access service is a telecommunications service subject to common carrier regulation under Title II. Indeed, in *AT&T Corp. v. City of Portland*, the U.S. Court of Appeals for the Ninth Circuit has already held that the transmission component of cable broadband services is, under federal law, a telecommunications service subject to the Act's nondiscrimination and interconnection obligations.[5] The Commission should utilize this proceeding to apply the *Portland* analysis nationwide and establish an effective and enforceable open access policy that applies to all cable broadband providers. In the absence of a national open access policy, cable operators will be able to maintain their dominant market share over the high-speed Internet marketplace by exercising monopolistic control over bottleneck facilities through which the majority of Internet traffic will pass.

Despite the clear need for and consumer benefits associated with mandated open access to cable broadband platforms, the cable industry continues to argue that the marketplace will somehow bring about open access on its own accord. The virtual absence of open access agreements to date, however, emphatically demonstrates that the marketplace approach is failing to produce the desired result. In the interim, cable operators continue to provide exclusive access to affiliated ISPs that has had the effect of denying cable broadband subscribers a choice of ISPs. In addition, the cable industry continues to make every conceivable legal, economic, historical, and technical argument against common carrier regulation of cable modem service as required by Title II of the Act and the *Portland* decision. At the very minimum, the cable industry's arguments are wholly inconsistent with the regulatory and economic realities of convergence among traditional communications marketplaces.

[5] *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), (hereinafter "*Portland*").

These reply comments refute the cable industry's contentions regarding the proper regulatory classification of cable modem service and the need for a national open access policy in today's dynamic Internet service marketplace.

Part II of these comments makes clear that cable modem service is neither a cable service nor private carriage, but a telecommunications service instead. Part III identifies the reasons that the marketplace alone has failed, and will continue to fail, to bring about open access absent action by the Commission. Part IV sets forth basic parameters of an effective open access framework and underscores the need for the Commission to follow the bedrock principle that like services must be governed in a like manner.

Cable operators have chosen to become common carriers by offering a telecommunications service over their existing cable system infrastructure. The Act requires that the nature of the service, not the underlying facility nor the particular provider, determines a provider's regulatory classification. The Commission should act immediately and declare that the Title II nondiscrimination and interconnection obligations that govern telecommunications common carriers apply to all cable broadband providers offering broadband Internet transport, which clearly is a telecommunications service. Such action—which will effectively establish a national open access policy—will ensure competition and choice in the broadband Internet market, thereby benefiting consumers and supporting innovation on the Internet.

II. CABLE INDUSTRY COMMENTORS ARE INCORRECT IN ARGUING THAT BROADBAND CABLE MODEM SERVICE IS SUBJECT TO TITLE VI REGULATION OR MEETS THE DEFINITION OF PRIVATE CARRIAGE

A. Cable Modem Service is not a Cable Service.

As the Ninth Circuit recently recognized in its *Portland* decision, Internet access service provided by cable companies and their affiliated ISPs bears little resemblance to traditional cable video service and for statutory classification purposes, many ways indistinguishable from services provided over telephone wires. Indeed, the Commission itself underscored the parallel identities of these two broadband services in its *Amicus Curiae* brief in the *Portland* case by arguing that, "[f]unctionally, Internet access provided through cable modems is no different from the . . . capability provided over other facilities such as the wireline telephone network."[6]

In explicitly recognizing the equivalent nature of these services, both the Ninth Circuit and the Commission recognize that formerly distinct transmission mechanisms—formerly distinct for regulatory purposes—now deliver identical services. In an age of technological convergence in the telecommunications industry, the nature of service, not the type of facility over which the service is provided, the particularities of the provider nor the historical regulatory classifications of either, determines its proper regulatory classification. Consequently, the Ninth Circuit correctly held in *Portland* that the transmission component of cable Internet access is not a cable service at all, but rather a telecommunications service subject to the nondiscrimination and interconnection obligations of Title II of the Communications Act. The Commission now has before it the opportunity to apply the holding in *Portland* nationwide by recognizing that cable modem service is a telecommunications service. Although the cable industry goes to great lengths in this proceeding to obfuscate the technological and regulatory ramifications of

[6] Brief of FCC as Amicus Curiae, *AT&T v. City of Portland*, at 25 ("FCC Ninth Circuit Amicus Brief").

convergence, it offers no persuasive argument as to why the Commission should not take such action.

Comments submitted by the cable industry assert that high speed cable modem service should be considered either a "cable service," subject to regulation under Title VI of the Act, an "information service," or a hybrid of the two.[7] These assertions are incorrect and inaccurately portray the type of communications utilized by subscribers of broadband[8] cable Internet access service.

Interestingly, cable operators consistently argue that cable modem service is a "cable service" when trying to avoid FCC regulation. However, when it comes to the question of whether the same cable operators must pay franchise fees to local franchising authorities for cable modem revenues, cable operators such as AT&T and Cox Communications, claim that their cable modem service is a "telecommunications service."[9]

As stated in OpenNet's comments, the transmission component of Internet access service provided by cable companies and their affiliated ISPs bears little resemblance to traditional one-way video cable service and is, for statutory classification purposes, substantively indistinguishable from broadband Internet transmission services provided over local telephone wires and regulated as telecommunications services under federal statute. In the same manner as telephone company-provided DSL service, the cable company provides transmission of

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[7] *Comments of AT&T Corp* at 11 (hereinafter "AT&T"); *Comments of Comcast Corporation* at 11 (hereinafter "Comcast"); *Comments of Cox Communications, Inc.* at 26 (hereinafter "Cox"); *Comments of the National Cable Television Association* at 6 (hereinafter "NCTA").

[8] "Broadband" is defined as two-way transmission at over 200 kilobits per second.

[9] *See* Leslie Cauley, *Two Firms Offering Web Via Cable Seek to Avoid Paying Franchise Fees*, THE WALL STREET JOURNAL, January 8, 2001, at B10.

broadband data communications between a customer's premises and an ISP (generally its affiliate, Excite@Home or RoadRunner). The latter entity then provides access to the Internet and proprietary content. This distinction between the two components of cable Internet access is readily apparent, as with DSL service, from the manner that cable providers offer their service to the public. Simply, and accurately, stated, the cable company provides the transmission component, whereas its affiliated ISP (Excite@Home or RoadRunner) provides an information service, which makes use of this telecommunications service.

The transmission component of cable Internet access, while provided over facilities primarily utilized heretofore for video programming, clearly does not constitute a "cable service" under the Act. "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming services."[10] The term "other programming service" is defined as "information that a cable provider makes available to all subscribers generally,"[11] and includes such content-based material as program guides, games and weather reports.

In order for the "other programming service" definition to apply, the information ***received*** by the subscriber, as opposed to information ***sent*** by the subscribers, cannot be individualized but must be information made "available to all subscribers generally." Internet data, including specific e-mails and other two-way interactive communications, are not made available to all subscribers generally. Congress reinforced this definitional boundary in its Conference Report accompanying the Act by stating that "[i]f information transmitted on a cable

[10] 47 U.S.C. § 522(6).

[11] 47 U.S.C. §522(14).

system is made available only to an individual subscriber or to a discrete group of subscribers, the transmission of this information is not a cable service."[12] Congress specifically referenced "shop-at-home and bank-at-home services, electronic mail... data processing, video-conferencing, and all voice communications," as the type of two-way interactive data services that are *not* cable services.[13]

No cable operator has claimed or can credibly assert that the broadband communications service it provides between a customer's premises and its affiliated ISP constitutes "video programming." Rather, the cable industry argues that the 1996 amendment to the definition of "cable service" allows them to shoehorn their broadband communications service into the regulatory vacuum of "other programming services."[14] NCTA references the addition of the term "or use" to the statutory definition of cable services in the Act. The definition now reads "subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming services."[15]

The 1996 amendment to the Act whereby Congress inserted the words "or use" into the definition of "cable services" ("subscriber interaction necessary to select or use …information") plainly did not contemplate a broad expansion of the statutory definition of cable services. Rather, this amendment was merely intended to recognize that cable providers were offering new types of information to *all subscribers generally*, such as game channels and program guides.[16]

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[12] H.R. Rep. No. 98-934, at 41, 44.

[13] *Id.*

[14] NCTA at 6.

[15] 47 U.S.C. § 522(6).

[16] H.R. Conf. Rep. No. 104-458 at 1109 (1996).

The revised definition explicitly, per the Conference Report, was not intended to cover subscriber-specific, *individualized* communications to the home such as e-mail. Indeed, the reinforced this in its statement that the amendment was "not intended to affect Federal or State regulation of telecommunications services offered through cable facilities."[17]

AT&T would have the Commission believe that cable modem service does not fall under the definition of "telecommunications services" because "AT&T chooses how to package the service and selects other information to transmit to its subscribers."[18] This packaging and transmission of selected other information, however, refers solely to the cable operator's display of its Internet home page or to offerings on the home page.[19] But forcing such content on unwilling consumers, because of the manner in which the cable operator has chosen to package its service with that of its affiliated ISP, does not transform transmission into content, or, more specifically, a telecommunications service into a cable service.

Because the cable provider markets its broadband transport service with the content service of its affiliated ISP, the end user actually has no choice but to accept this bundled package. For regulatory classification purposes, the cable operator's decision to bundle broadband transport with limited content does not, however, transform the basic, distinguishable character of either component. As the Ninth Circuit's *Portland* decision made clear, transport

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[17] *Id*.

[18] AT&T at 22.

[19] AT&T, of course, is barred by Commission order from requiring customers to access its home page. *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authority from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3206-07 (paras. 95-96) (1999).

remains a telecommunications service under the Act, while content remains a separate information service.[20]

A consumer utilizing a cable modem no more needs to use the cable operator's proprietary home page to access the Internet than a phone user needs to use directory assistance in order to make a call. While both collateral services (i.e., home page content and directory assistance) may be useful, they are not inherently necessary to utilize the transport services. In the cable operator example, the availability of the home page content does not transform the transport function bundled with it into a cable service.[21] Similarly, the determination of how much bandwidth to dedicate to Internet access, even if made by a cable operator, has no bearing on the statutory definition of that service. Controlling the amount of data that may be transmitted, i.e., "throttling up or down" the bandwidth available, is clearly an aspect of providing a telecommunications service.

The focus of this proceeding and the open access debate is the transmission of data (such as web pages, e-mail or any other communications) to, from and over the Internet. Numerous parties agree with the OpenNet Coalition that under the Communications Act, data is content; its transmission constitutes a telecommunications service.[22] The decision in *AT&T Corp. v. City of*

[20] *City of Portland*, 216 F.3d at 876.

[21] AT&T also referred to "peering and the other necessary commercial arrangement" it has entered into with other Internet backbone providers to gain access to the full Internet. AT&T implies that these arrangements are another example of how AT&T adds value to Internet transmission over cable modems and claims this service is akin to its offering of specific channels to cable television consumers. This position does not alter the definitional aspect of peering agreements, however, which are inherently transport services and undertaken by the transport provider or Internet backbone operator. As with other telecommunications services, these arguments do not transform the provision of Internet access into a "cable service."

[22] See generally, *Comments of WorldCom* at 10 (hereinafter "WorldCom"); *Comments of SBC & Bell South* at 8-12 (hereinafter " SBC & Bell South") ; *Comments of Qwest* at 4 (hereinafter " Qwest"); *Comments of Texas Office of Public Utility Counsel* at 4-6 (hereinafter " Texas Office of Public Utility

Portland[23] directly addressed this distinction and the Ninth Circuit found that the transmission component of cable Internet access is not a cable service at all, but rather a telecommunications service. The content tier of this service—the home page, e-mail, etc.—is properly classified as information services. Consequently, the Ninth Circuit found that the transmission component of cable Internet access is fully subject to regulation under Title II of the Communications Act rather than the regulatory oversight of local franchising authorities or the Commission's Title VI jurisdiction. As the Ninth Circuit stated:

> Internet access is not one-way and general, but interactive and individualized beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information transmission unmatched by the act of electing to receive one-way transmission of cable or pay-per-view television programming.[24]

The transmission component of Internet access exemplifies the interactive nature of Internet communications and therefore a "telecommunications service," regardless whether the service is provided over a copper wire (traditionally used for telephone communications) or a coaxial cable wire (traditionally used for cable communications). The essential nature of broadband transport—transmission of communications between the end user and the ISP—is identical no matter what wire is used to obtain the service. The Commission has recognized this point.[25] Therefore, despite the comments of the cable industry to the contrary, the basic nature of cable modem service subjects it to the definition of telecommunications service under the Act.

Counsel"; *Comments of Earthlink* at 19-21 (hereinafter "Earthlink"); *Comments of Circuit City Stores* at 3 (hereinafter " Circuit City Stores"; and NASUCA p. 6-8.

[23] *City of Portland*, 216 F.3d 871, 874.

[24] *City of Portland*, 216 F.3d at 876.

[25] FCC Ninth Circuit Amicus Brief at 25.

B. Cable Modem Service is Not Private Carriage.

Certain cable operators claim that if the Commission recognizes cable modem service as a telecommunications service, the Act's common carrier obligations would still not apply. As NCTA puts it "even if a cable operator were simply to provide transport service to unaffiliated ISPs, it would constitute private carriage, not common carriage."[26]

The cable industry relies for its proposition primarily on two cited decisions - *National Association of Regulatory Utility Commissioners, et al. v. Federal Communications Commission (NARUC I)*[27] and *National Association of Regulatory Utility Commissioners, v. Federal Communications Commission (NARUC II).*[28]

In *NARUC I,* the D.C. Circuit set forth the standard for determining whether an agreement between a provider of telecommunications services and a re-seller of such services was that of a common carriage or private carriage relationship. Under *NARUC I*, in order for a finding of common carriage, the relationship must meet a two-pronged test: (1) the offering of telecommunications services for sale to the public on an indiscriminate basis;[29] and, (2) the practice of the service provider to not make individualized decisions, in particular cases, whether and on what terms to deal in such services.[30]

In *NARUC II*, the Court applied the test in a context very similar to that being considered by the Commission in the matter of this NOI - the transmission over cable channels of two-way,

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[26] NCTA at 14.

[27] *NARUC I* , 525 F.2d 630 (D.C. Cir. 1976).

[28] *NARUC II*, 533 F.2d 601, (D.C. Cir. 1976).

[29] *NARUC I* at 641.

[30] Id. at 642.

point–to-point, non-video communications.[31] Contrary to the conclusion the cable industry would have the Commission draw from it citation of these cases, the Court in *NARUC II*, held, "[a]pplying these two tests to the two-way, point-to-point, non-video communications over which the Commission here asserts its pre-emptive power, we conclude that a common carrier activity is involved."[32] Clearly, the import of the Court's second *NARUC* decision is to apply common carrier status to the type of two-way, point-to-point, non-video communication where the consumer determines the content of the return message – the essential ingredient of interactive, two-way communications over the Internet. Lest there be any doubt as to its intent, the Court continued, "[w]e therefore conclude that **most, if not all,** of the uses to which the two-way, non-video cable capability is likely to be put (*sic*) fall within the term 'carrier' as used in 47 U.S.C. §152(b)" [emphasis added].[33] Amplifying its decision, the Court added that, "[w]e hold that **any** two-way use of cable in which the customer explicitly or implicitly determines the transmission or content of the return message, satisfies the second prerequisite to common carrier status."[34]

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[31] *NARUC II* at 601.

[32] *NARUC II* at 609.

[33] *NARUC II at 610.* The broadband Internet access that cable operators are providing, is not the packaging and selling of carriage to non-affiliated ISP "re-sellers," but the marketing and selling of high speed Internet service directly to consumers through wholly-owned and controlled subsidiaries of the cable companies themselves. Central to the Court's decision of *NARUC I, is* its assumption that at some point in the continuum of sale from provider to the re-seller of such telecommunications services, the consumer would be the beneficiary of common carriage status being imposed on either of the former parties. *See generally, NARUC I at 640-642* . Another fundamental ingredient of this "private carriage" analysis is the assumption that the re-seller of such telecommunications services is independent of the provider and that the private sale of such services to the re-seller is to other common carriers and not directly to the public. *See generally, Virgin Islands Telephone Corporation v. FCC,* 198 F3d. 921, 923-925 (the Court also reaffirmed the continued viability of the *NARUC* decisions after the enactment of the Telecommunications Act of 1996) .

[34] *Id. At 610.* [emphasis added]

It is difficult to imagine that the Court could have been more clear, even from its prescient vantage point twenty years before the dawning of the Internet age, that cable Internet service is to be treated as common carriage. By citing *NARUC II* in their comments before the Commission, it is difficult to imagine how the cable operators could continue arguing that they are not common carriers in light of the telecommunications services they are providing to consumers. They should be held to their citation of the *NARUC* cases and be their telecommunications services governed accordingly. Contrary to the cable industry's claims, the NARUC precedents confirm that providers of cable broadband Internet transport should be subject to Title II common carrier obligations.

III. THE MARKETPLACE IS FAILING TO BRING ABOUT OPEN ACCESS AGREEMENTS.

In its comments, Cox asserts that no evidence currently exists of market failure in the cable broadband market and, therefore, no FCC action to require open access to cable modem service is required.[35] This assertion, however, ignores glaring evidence to the contrary, namely the dearth of open access agreements, that demonstrates the market's failure to independently establish open access. This failure will continue, with disastrous results for consumers and independent ISPs, unless the Commission takes action to address cable's disproportionate power in the broadband Internet access market. Absent the recognition that cable modem service is a telecommunications service subject to common carrier nondiscrimination and interconnection obligations under Title II, independent ISPs will never achieve meaningful access to the dominant, and in many cases, exclusive, method of broadband transport in the United States.

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[35] Cox at ii.

The FCC must establish an open access requirement nationally and enforce it against the entire cable industry.

As the OpenNet Coalition stated in its comments, the real test of the marketplace's success is the number of implemented ISP open access agreements between cable providers and unaffiliated ISPs. By this yardstick, the marketplace has failed. True open access has not been implemented anywhere in the United States and currently only a few open access agreements exist.[36] Of the more than 7,000 ISPs operating in the United States, only a few large ISPs have actually signed open access agreements with cable broadband providers.[37] Additionally, the FTC recently required Time Warner, as a precondition to merger approval, to agree to allow a total of at least three unaffiliated ISPs (one prior to initiating service with AOL, two more within ninety days) access to its broadband cable system. Although these developments represent considerable movement from the cable industry's prior "closed access today, closed access tomorrow, closed access forever" stance, such isolated agreements are in no way evidence of, or substitutes for, full open access implemented nationwide. They serve only to underscore the failure of the broadband marketplace, absent regulatory pressure, to bring about open access on a voluntary basis.

Moreover, the above agreements are limited strictly to the involved parties. They do not extend to the other 7,000 ISPs, particularly small ISPs that generally lack the resources, customer

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[36] WorldCom at 6 . "(The Commission) cannot ignore the simple fact that no unaffiliated ISP has been able to provide service to the public on a nondiscriminatory and commercial basis using the transmission service for Broadband Internet service over any cable system." Texas Office of Public Utility Counsel at 12-13.

[37]Earthlink entered into an agreement with Time Warner on November, 20, 2000 whereby Time Warner would offer EarthLink's high-speed Internet services over its cable systems. Juno also signed a letter of intent for carriage with Time Warner on July 30, 2000.

base and bargaining power of larger ISPs, and which should be afforded similar access opportunities. Such opportunities will not transpire absent a national rule established and enforced by the Commission. Consequently, the Commission should take action to apply the terms of the Ninth Circuit decision and the goals of the FTC's AOL/Time Warner model to the entire broadband cable modem industry.

The progress ISPs have made to date with the cable industry regarding access has been the direct result of substantial pressure by the federal government. For example, AT&T announced its Boulder trial while its merger with MediaOne was pending. Comcast announced its planned Philadelphia test on the eve of the comment deadline in this proceeding. As the Competitive Access Coalition aptly points out, antitrust law does not give much weight to decisions made under pressure of government antitrust action.[38] Moreover, the cable industry will has little motivation to enter into any further open access agreements. Until open access agreements result from competitive negotiations conducted under the requirements of Title II as opposed to threat of regulatory action, the broadband marketplace will continue to fail to bring the benefits of competition to consumers.

AT&T and others point to ongoing or planned trials as evidence of the cable industry's commitment to open access,[39] but these are no more than a fig leaf attempting to hide the cable industry's intransigence. While open access trials are encouraging in that they represent an abandonment of the cable industry's historic "technically infeasible" argument, promises of

[38] *Comments of Competitive Access Coalition* (hereinafter "Competitive Access Coalition"), citing, *inter alia*, *U.S. v. Continental Can Co.*, 378 U.S. 441, 463 (1964). See also, Consumer and ISP Representatives at 12, "only those cable companies under threat of an antitrust investigation or seeking merger approval from the Commission have even entertained the concept of negotiating access arrangements with unaffiliated ISPs."

[39] AT&T at 61, *Comments of Excite @ Home* at 13 (hereinafter "Excite@Home").

future ISP trials which are many months away[40] or trials that are limited to one ISP[41] provide little comfort to the many ISPs currently seeking carriage on cable modems who have been excluded.

In addition, AT&T's Boulder trial is being conducted in a manner that deprives ISPs of control of both the first screen and the customer relationship. In AT&T's trial in Boulder, CO, customers have access to eight competitive ISPs, but cannot avoid the AT&T logo on their screens and are automatically steered to AT&T's affiliated ISP's browser, a situation readily acknowledged by AT&T officials.[42] Consequently, it remains unclear whether the cable industry's planned trials are intended to set the stage for a workable transition to true open access or merely to defer regulatory scrutiny of the cable industry, by creating the "illusion" of open access.[43]

A. Marketplace Forces Alone Cannot Bring About Consumer Choice and Competition In Broadband Internet Services.

The Commission has been reluctant to mandate open access requirements out of a belief that the market would open cable networks through competitive forces. AT&T boasts in its

[40] AT&T at 65, citing AT&T's planned fourth quarter 2001 Massachusetts trial.

[41] Comcast at 37 referencing the planned Comcast/Juno trial in Philadelphia.

[42] *See* Peter Goodman, "AT&T Puts Open Access to a Test," *Washington Post*, November 23, 2000 at E01. (According to a senior AT&T executive) "To get to the Internet, you have to do something with that (AT&T) globe. It puts the (AT&T) brand in the customer's mind…so that (AT&T has) the ability to drive some additional revenue."

[43] *Id.* at E01. "'This while test is not about interoperability,' said Douglas H. Hanson, chief executive of RMI.net Inc., a Denver-based ISP that is participating in the trial. 'It's about, "How can we put up a smoke screen to satisfy the regulators to prevent regulation of cable access."'

comments that the wisdom of the Commission's self-described "hands off" policy[44] is confirmed by the cable industry's market-based initiatives.[45] When left to their own devices, however, most cable providers have shown an inclination to propose onerous, uneconomic terms that would effectively exclude most ISPs from their systems.[46]

"Market-based" negotiations cannot result in meaningful open access due to unequal bargaining power and other competitive market inefficiencies. Cable providers, as the dominant broadband access market players, have superior bargaining power in any negotiation with a unaffiliated ISP, and interconnection with any particular ISP is at the cable provider's discretion. Consequently, the goals of open access cannot be achieved through market-based negotiations that have no viable enforcement foundation as a result of the Commission's inaction.[47]

The problem inherent in the Commission's "market-based" policy is that it is dependent on a truly competitive market in order to be successful. In order for market principles to work, the market must be free and vibrant. Unfortunately, the residential broadband Internet access market is not functioning at a truly competitive level due to the cable industry's dominant, and in many cases, monopolistic market share. Accordingly, since the marketplace is less than truly competitive, the Commission's "market-based" approach has not and cannot, in and of itself, deliver meaningful and enforceable open access. Absent a declaration by the Commission that cable modem service is a telecommunications service subject to the common carrier

[44] Federal Communications Commission, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00 185, (September 28, 2000) ¶ 4, 35-37 (hereinafter "NOI").

[45] AT&T at 51.

[46] See generally *Comments of BrandX at 2* (hereinafter "BrandX Internet"), Competitive Access Coalition at 41-42 and *Comments of Consumers Union et al. at 26-28* (hereinafter "Consumers Union")

[47] Competitive Access Coalition at 24-25.

nondiscrimination provisions of Title II of the Telecommunications Act, almost all independent ISPs will be foreclosed from the dominant portion of the broadband Internet market entirely.

B. Cable Remains the Dominant Provider of Broadband Services.

Numerous cable providers[48] point to the expanding broadband market and the emergence of competitive broadband access alternatives as evidence that the market for broadband services is competitive and that marketplace forces are working. However, when the cable industry admonishes the Commission to "let the market work," what it really means is "let current market conditions continue" so that the cable industry can further solidify its dominant market share by continuing to escape the open access obligations imposed on its only real competitor, DSL.[49]

Claims by the cable industry that dial-up and cable broadband Internet access services comprise the same market[50] ignore fundamental distinctions between the two services as well as stark market realities.[51] The markets for dial-up and cable broadband Internet access services are distinct, and this distinction does not lie solely in speed differential (although broadband Internet access is generally fifty to one hundred times faster than traditional dial-up service). Rather, the

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[48] See Cox at 5-7, Comcast at 5-10, AT&T at 35-46, *Comments of Charter Communications* at 3-7 (hereinafter " Charter"); *Comments of Cablevision* at 7-11 (hereinafter "Cablevision").

[49] *Comments of Texas PUC* at 15 (hereinafter "Texas PUC").

[50] Charter at 6; Cox at 8; AT&T at 47, claiming that "cable Internet service providers' principal competitors remain the dial-up narrowband services over which 90 percent of subscribers nationwide obtain access to the Internet."

[51] AT&T itself has essentially admitted this. The consent decree entered into by AT&T, MediaOne and the United States Department of Justice recognizes that competitive protections are necessary and appropriate with respect *not* to the *overall* Internet access market, but rather to the "Residential Broadband Service" market, which is defined to mean the provision of Internet access at speeds in excess of 128 kilobits per second *United States of America v. AT&T Corp. and MediaOne Group, Inc.*, United States District Court for the District of Columbia, Final Judgment, submitted May 25, 2000. The referenced definition appears at para. II.F.

primary distinction lies in the additional services enabled by broadband, such as real-time audio downloads, video conferencing and streaming video, that are not available or technically feasible over a dial-up connection. Simply put, the services are not exact substitutes for one another and therefore not part of the same market.[52] Customers underscore the distinction between the markets, as Big Planet notes in its comments, by their unwillingness to switch back to narrowband after choosing broadband, even in the face of broadband price increases.[53] Even AT&T Canada long distance recognizes that dial-up and broadband are two distinct markets.[54]

Within the context of this relevant market, cable broadband remains the dominant market player, with only one notable competitor—DSL. Although numerous cable providers point to satellite and fixed wireless as potential competitors,[55] these products are in their infancy, many are high-speed in only one direction, and they comprise a mere 3,649 subscribers (or 0.2% of the total advanced services subscribers in the country).[56] Cable modems control 71% of the total broadband Internet access market compared to DSL's 22%.[57] Although businesses utilize a wide

[52] Substitutability is the main consideration by economists in defining relevant markets. See Affidavit of Nels Pearsall, Keith Reutter and Robert Sinclair, attached to Competitive Access Coalition. "We also do not consider traditional narrowband 'dial up' network access to be an adequate substitute for the broadband network," Affidavit at 7.

[53] *Comments of Big Planet* at 5 (hereinafter "Big Planet").

[54] *See* AT&T Canada Long Distance Services' Comments in Response to the Canadian Radio-television and Telecommunications Commission's Telecom Public Notice 96-36, submitted February 4, 1997, pp. 6-7.

[55] AT&T at 45; Charter at 4.

[56] Federal Communications Commission *Report on Internet Access Subscribership*, October 2000. Even Echostar Satellite Company admits in its comments that its broadband service is "relatively cumbersome for consumers," is "seriously bandwidth-limited," and "simply cannot compete" with cable offerings. *Comments of Echostar* at 5 (hereinafter "Echostar").

[57] Big Planet at 4, citing United States General Accounting Office (GAO) Report to the Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary, US Senate, Technological *and Regulatory Factors Affecting Consumer Choice of Internet Providers*, October 2000, at 12, 44.

range of Internet access products (such as T-1 and T-3 lines), residential broadband access is limited, for the most part, to either cable modem or DSL. "For all practical purposes, Cable and DSL are currently the only broadband options available in the residential market and Cable has a substantial lead over DSL."[58]

Even within the broadband marketplace, cable and DSL do not always compete head-to-head. In fact, "cable modem service may be the only broadband provider in up to 50% of residential homes."[59] In these geographic areas, cable carriers have monopoly power and exercise bottleneck control over essential broadband facilities. The Commission, through its current "hands off" policy, is creating a broadband monopoly in these areas by not enforcing common carriage nondiscrimination requirements on these cable carriers.

Since 20-40% of local exchange carriers' local loops are not capable of being upgraded to provide DSL,[60] for many residential Internet customers, cable will be the sole broadband network available. As Professors Bar, *et al.*, point out:

> Overall national figures, whether market share or addressability, provide a misleading picture of the competitive situation. Indeed in the short to medium term, broadband cable and DSL deployments are taking place along two distinct footprints, with relatively limited overlap. The cable modem footprint generally covers only residential areas and clearly dominates in many suburbs. While we can expect that eventually, most homes will have a choice between two broadband wires, cable and DSL, in the

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[58] "Access and Innovation Policy for the Third-Generation Internet," Bar, Cohen, Cowhey, deLong, Kleeman, Zysman, Telecommunication Policy, Volume 24, Nos. 6/7 (July/August 2000).

[59] Jeffrey K. MacKie-Mason, "*Investment in Cable Broadband Infrastructure: Open Access is Not an Obstacle*," November 5, 1999 at A-6, citing "*Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Federal Communications Commission, January 1999, pp. 24-25.

[60] Big Planet at 7, citing FCC Advanced Services Report at 46.

> near term most will only have one option, and in most cases that option will be cable.
>
> ***
>
> Cable operators and Telcos often are not really competing head-on, having esssentially partitioned the broadband access market: cable modems for residences, DSL for small and medium sized-businesses.[61]

Even in areas where consumers have a choice of both DSL and cable modem for broadband Internet access, the broadband access market is at best a duopoly. As Worldcom points out, duopolies in markets where entry is difficult are anticompetitive.[62] Moreover, in these markets, inefficiencies exist due to the inconsistent regulatory approaches governing each access service. Customers cannot hop between DSL and cable modem service and still maintain their preferred ISP as well as their existing email address.[63] Thus, absent a national open access policy applicable to all cable broadband providers, the broadband market is less efficient because consumers cannot easily substitute services, resulting in decreased competition between DSL and cable modem service. These competitive disparities could be substantially eliminated through consistent application of Title II common carrier nondiscrimination and interconnection principles to all telecommunications providers, including providers of cable modem broadband transport.

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[61] Bar, Cohen, Cowhey, deLong, Kleeman, Zysman, at 17, 19, citing "Broadband!," A Joint Industry Study by McKinsey and Sanford Bernstein, January 2000. p. 10-11.

[62] Worldcom at 7, citing *FTC v. Heinz, H.J. Co.*, No. 00-5362, 2000 WLL 1741320 (D.C. Cir. Nov. 8, 2000).

[63] Similarly, Congress and the FCC recognized, in relation to number portability, that consumers are less likely to switch service providers if they cannot retain their previous number, or, in this case, email address.

C. Despite Two Years of Rhetoric to the Contrary, the Cable Industry Now Admits That Open Access is, in Fact, in Its Best Business Interest.

In an attachment to the National Cable Television's Association's comments in this proceeding,[64] three consultants to the NCTA set forth various economic rationales as to why open access is, all of a sudden, strategically and financially beneficial to cable broadband providers. In this paper, the cable industry adopts many of the economic and policy positions that OpenNet and its individual members have been advancing since this debate began—that cable operators lose profits by offering only their proprietary ISP service and cable provider profits increase with the number of ISPs offered.[65]

In adopting this approach, NCTA seeks to convince the Commission that action in this docket is unnecessary because significant market incentives already exist for the cable industry to pursue open access. However, the Commission should not misinterpret this philosophical "conversion" by the cable industry as a substitute for the implementation of true nondiscriminatory and enforceable open access. While this dramatic reversal in position is as welcome as it is astonishing, the OpenNet Coalition implores the Commission to employ a "trust but verify" approach to monitoring future cable industry progress on opening cable broadband networks, coupled with the Commission's establishment of a national open access policy applicable to the entire cable industry that ensures effective enforcement for all ISPs and their customers.

Despite its recent theoretical commitment to the economic principles of open access, the cable industry's real world record of signing and implementing open access agreements with

[64] Stanley Besen, Patrick DeGraba and John Woodbury, "*The Incentives of Cable Operators to Carry Multiple ISPs*," December 1, 2000, attached to NCTA comments.

[65] Id. at 3, 4.

unaffiliated ISPs remains virtually nonexistent. The only way for the Commission to hold the cable industry accountable to its newly-found realization is to recognize cable modem service as a telecommunications service subject to Title II common carrier nondiscrimination obligations.

IV. THE COMMISSION SHOULD ACT TO ENSURE OPEN ACCESS BY CREATING A NONDISCRIMINATORY FRAMEWORK FOR THE NEGOTIATION OF OPEN ACCESS AGREEMENTS.

A. Once the Commission Declares That Cable Modem Service is Subject to Title II, the Statutory Obligations of Non-Discrimination and Interconnection are Triggered.

Once cable companies expanded their palette of services to include telecommunications services, they became subject to the common carrier provisions of the Telecommunications Act. The provisions of Title II of the Act establish the necessary foundation for a market-based solution to the issue of open access. Sections 201 and 202 of the Act set forth a baseline of nondiscrimination for the provision of telecommunications services. These sections ensure that all telecommunications providers, including cable companies offering cable modem service, set charges that are "just and reasonable"[66] and that no preference is given to any, "…particular person, class of persons or locality."[67] The Act then sets forth a duty of telecommunications carriers to interconnect with other telecommunications carriers in Section 251.

Under the framework established by Sections 201, 202 and 251, negotiations can commence on a good faith basis between cable companies and ISPs. The undertaking of such negotiations, of course, in no way obviates a cable operator's statutory nondiscrimination or interconnection duties. Indeed, it is clear that absent the overlay of Title II's protections, cable

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[66] 47 U.S.C. § 201 (b).

[67] 47 U.S.C. § 201 (a).

companies will not engage in any meaningful access negotiations with ISPs.[68] It is not realistic to assume that absent a statutory mandate, a cable company would negotiate on fair and equitable terms with an identified competitor. In that regard, almost all of the comments submitted by the providers of cable modem service expressly make the point that they treat ISPs providing dial-up and DSL Internet connections as competitors.[69]

Therefore, if the Commission accepts the fact that open access is a desirable public policy, but fails to extend to all Americans the Ninth Circuit's *Portland* ruling by recognizing cable modem service a telecommunications service, it will not have remedied the very ill it has identified. Cable broadband providers, as providers of telecommunications services, are statutorily prohibited from continuing to pick and choose which, if any, competitors they (or their affiliated ISPs) will face in the broadband marketplace. So long as the dominant player in a market is given effective control over the ability of competitors to enter the market, the benefits derived from open and robust competition will remain unrealized. The end result will be a continuation of the predatory pricing, bad faith negotiation, and endless delay that the ISP community has experienced to date from cable broadband providers.[70]

The Federal Trade Commission established a framework for nondiscriminatory negotiations between cable companies and ISPs in its AOL-Time Warner consent decree.[71] This

[68]*See* Affidavit of Stephen Heins attached to *Comments of The Consumer and ISP Representatives* (herinafter "NorthNet") demonstrates the problem of relying solely on the marketplace to produce open access.

[69] *See, e.g.*, Cox at ii, 5-8; Charter at 3-7; Comcast at 5-10 and Cablevision at 7-11.

[70] NorthNet at Affidavit of Stephen Heins, BrandX at 2.

[71] The FTC Consent Order requires AOL-TW to allow at least one independent ISP to provide cable modem service in a market before its offers cable modem service through an affiliated ISP. AOL-TW must then reach access agreements with at least two additions independent ISPs within 90 days of AOL-

framework must be applied to all cable modem providers, as the FTC's consent order only addresses those markets served by AOL-Time Warner. Even this model, however, does not supercede a cable operator's Title II obligations as a telecommunications service provider.

While Title II establishes a statutory baseline, and the FTC's AOL-Time Warner consent decree provides a model, the Commission can and should further act to ensure a speedy and fair roll out of open access by establishing a framework for the ancillary issues attendant to open access negotiations. This framework would address issues such as identifying technically feasible points for access, prohibiting discriminatory use of customer information, ensuring a level playing field in the marketing of services to potential customers, and restricting network activities which discriminate against independent ISPs receiving transport service from cable companies.[72] This is important because the experience of small and medium-sized ISPs attempting to enter into access negotiations with cable providers demonstrates that, given the opportunity, cable providers will use any means possible to delay such negotiations thereby enabling them to continue to strengthen their first mover advantage in the broadband marketplace.[73]

Thus, the Commission should not use this proceeding to determine *if* cable companies must provide open access to their networks, but rather *how* open access to those telecommunications services will be accomplished under the existing requirements of Title II.

TW providing cable modem service. Jim Hu, *FTC Approves AOL-Time Warner Merger,* CNET NEWS (December 14, 2000) @http://news.cnet.com/news/0-1005-200-4149427.html.

[72] This type of framework is essential as certain cable operators continue to throw technical roadblocks in the face of open access, such as AT&T's continued assertion that it must complete technical trials to determine if open access is technically feasible. BrandX at 2.

[73] The comments submitted by NorthNet illustrate the difficulty faced by a relatively smaller company seeking to negotiate with a large entrenched *de facto* monopoly. NorthNet at Affidavit of Stephen Heins.

This determination may be accomplished by establishing a clear framework for the negotiation of access agreements by cable operators and ISPs and a mechanism to resolve any conflicts that may arise. Through such action the Commission will ensure that all ISPs, both large national companies and smaller regional and local providers, will have a level playing field to negotiate beneficial agreements with cable companies for the provision of competitive cable modem services, and thereby benefit consumers.

B. It is Well Settled that Like Services Must be Governed in a Like Manner.

In response to increasing competition in their core programming business, cable operators are using their cable facilities for the provision of broadband Internet transport/access service[74]– a telecommunications service subject to Title II. Cable operators are also rapidly transforming their facilities into broadband networks that have the potential to supplant telephone company local loops as the most efficient and highest-capacity last-mile delivery systems available.[75] Through these revamped systems, many cable operators can now offer "basic" and "enhanced" services over one connection into homes and businesses in direct competition with the services that incumbent and new-entrant LECs offer.[76]

In short, over the last few years and in response to the evolving marketplace and the 1996 Act, cable operators have *voluntarily* transformed themselves into common carriers as a result of these new service offerings and business plans. As a result, cable operators can no longer credibly argue that they are not similarly situated with telephone companies with respect to these

[74] Comcast at 5-8; Cox at 2-5.

[75] Comcast at 5-8; Cox at 2-6, 18-20.

[76] Cablevision at 6-9.

new telecommunications offerings but rather are entitled to exclusive Title VI regulation. As a matter of law, telecommunications services offered by traditional cable operators are inherently subject to Title II notwithstanding the historical regulatory treatment of the cable industry. The open access model championed by the OpenNet Coalition, which is substantially similar to the Commission's first model proposed in the NOI, would effectively implement this legal requirement by requiring nondiscriminatory access,[77] similar to requirements that apply to any CLEC or other new entrant providers.

Cable operators believe that DBS providers, DSL service providers, MMDS, and other alternative broadband providers are providing adequate competition in the broadband Internet access industry.[78] Moreover, Cox Communications specifically contends that "there is absolutely no evidence that all broadband services must be subjected to common carrier regulation to ensure that the broadband marketplace develops or that American consumers are well-served."[79]

V. CONCLUSION

For the foregoing reasons, the OpenNet Coalition respectfully requests that the Commission recognize cable modem service as a telecommunications service subject to the Communication Act's nondiscrimination and interconnection requirements. Further, the Open Net Coalition asks the Commission to establish a uniform national framework for the negotiation of nondiscriminatory access to broadband cable networks.

[77] *Comments of the OpenNet Coalition* at 21-24 (hereinafter "OpenNet Coalition"); NOI at ¶ 30.

[78] AT&T at 94-95, 97-98; Cox at 12; Cablevision at 5-9; Comcast at 8-11; Charter at 3-7.

[79] Cox at 17.

Respectfully submitted,

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